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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EILEEN E. LECUYER, Plaintiff and Appellant, v. SUNSET TRAILS APARTMENTS et al., Defendants and Respondents.	D042416 (Super. Ct. No. GIC 781227)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Reversed in part, affirmed in part, and remanded with directions.

Law Offices of Thomas Leary and Thomas A. Leary for Plaintiff and Appellant.

Borton, Petrini & Conron, Paul Kissel and David G. Molinari for Defendants and Respondents.

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* Pursuant to California Rules of Court rule 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and II.

Plaintiff Eileen E. Lecuyer was seriously injured at night near a parking lot at the Sunset Trails apartment complex when she stepped backward over the edge of an elevated and unrailed concrete walkway or sidewalk that was adjacent to the parking lot and fell down into an adjoining dirt or planter area between the sidewalk and one of the apartment buildings. Lecuyer brought an action for negligence and negligence per se against both the owner and manager of the property, Sunset Trails Apartments, LP (a California limited partnership) and M.G. Properties Company, respectively (together Sunset Trails).

Before a jury trial commenced in this matter, Sunset Trails mailed to Lecuyer's counsel an offer to compromise under Code of Civil Procedure section 998[1] (the § 998 offer). Lecuyer received the offer but did not accept it.

The court refused to give a negligence per se instruction to the jury, but did permit an expert to state his expert opinion that the lack of a guardrail along the sidewalk created an unsafe condition.

The jury found that Sunset Trails was negligent and that Lecuyer suffered damages in an amount in excess of $350,000 as a result of that negligence. The jury also found that Lecuyer was 90 percent at fault and Sunset Trails was only 10 percent at fault. As a result of these findings, Lecuyer failed to obtain an award of damages that was more favorable than the amount of Sunset Trails' section 998 offer.

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1 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Lecuyer appeals, contending (1) the court erred in finding that Uniform Building Code (UBC) section 1716[2] was inapplicable; (2) the court committed instructional error by not giving a negligence per se jury instruction based on Sunset Trails' failure to install a guardrail as UBC section 1716 allegedly required; (3) even if UBC section 1716 did not apply directly to the sidewalk condition in question, the court should have allowed her experts to testify concerning UBC section 1716 as a basis for their respective opinions; and (4) the court erred in ordering Lecuyer to pay Sunset Trails' costs under section 998 because Sunset Trails' section 998 offer was not valid as it was not served by mail at least 15 days prior to trial.

Assuming without deciding that the court erred in not allowing Lecuyer's experts to testify about UBC section 1716 and in refusing to give a negligence per se instruction, we hold that the error was harmless. We also hold that the court erred in ordering Lecuyer to pay Sunset Trails' costs under section 998.

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2 The 1979 version of UBC section 1716, which is part of the record on appeal pursuant to Sunset Trails' motion to augment the record and for judicial notice, which we granted, provides in part: "All unenclosed floor and roof openings, open and glazed sides of landings and ramps, balconies or porches which are more than 30 inches above grade . . . shall be protected by a guardrail. Guardrails shall not be less than 42 inches in height."

FACTUAL BACKGROUND[3]

On September 19, 2002, Lecuyer's daughter, Jennifer Clauss, resided in an apartment at the Sunset Trails apartment complex in Santee, California. Clauss asked that Lecuyer and one of Clauss's friends assist her in putting a sofa into the back of Clauss's pickup truck, which Clauss had parked in the parking lot behind her apartment. That evening, when it was dark, Clauss got into her pickup and backed it up to the east side of the sidewalk that runs in a north-south direction next to the parking lot and between the parking lot and the apartment building.

As Clauss's friend was putting the couch into the back of the truck, Clauss was trying to back the truck up a little more so as to "angle [the couch] better onto the truck." Lecuyer, who was wearing a walking cast, was standing on the sidewalk facing in an easterly direction toward the back of the truck, waving to Clauss and asking her to move the truck back further. Lecuyer's back was toward the west edge of the sidewalk, which was the lip of a retaining wall that extended down to the planter area between the sidewalk and the apartment building. That side of the sidewalk did not have a guardrail. As she was motioning to Clauss, Lecuyer began stepping backwards, went over the edge of the sidewalk, and fell into the planter area below. She suffered shoulder, leg and foot injuries, and underwent multiple surgeries.

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3 Because we shall assume, for reasons we shall explain, that the court erred in finding that UBC section 1716 was inapplicable and by not permitting Lecuyer's expert witnesses to testify about UBC section 1716 as the basis for their opinions, our discussion of the facts is abbreviated.

PROCEDURAL BACKGROUND

Lecuyer brought suit against Sunset Trails for negligence and negligence per se. In support of her negligence per se cause of action, Lecuyer claimed that the lack of a guardrail along the edge of the sidewalk where she fell was a violation of UBC section 1716.[4]

On February 19, 2003,[5] 13 days before the jury trial commenced in this matter on March 4, Defense counsel mailed to Lecuyer's attorney Sunset Trails' section 998 offer to settle the case in the amount of $150,001. Lecuyer's counsel received the section 998 offer on February 24, but Lecuyer did not accept the offer.

At trial, the court ruled that UBC section 1716 did not apply to the sidewalk in question so as to require a guardrail, and the court did not permit Lecuyer's expert witnesses—safety engineer Kenneth Bonatus and architect Edward Grochowiak—to testify about UBC section 1716 as the basis for their opinions. The court, however, permitted Bonatus to testify to his expert opinion that the lack of a guardrail along the walkway created a dangerous and unsafe condition. The court refused to give a negligence per se instruction to the jury, but gave instructions on common law negligence of an owner of property.

The jury returned a special verdict finding that Sunset Trails was negligent and that negligence caused Lecuyer's injuries and damages. The jury found that Lecuyer

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4 See footnote 2, *ante*.

5 All further dates are to calendar year 2003 unless otherwise specified.

suffered damages in the amount of $357,945.52. The jury also found by a nine-to-three vote that Sunset Trails was 10 percent at fault, and Lecuyer was 90 percent at fault. As a result of these findings, the jury's award of damages in favor of Lecuyer totaled $35,794.55.

In posttrial proceedings, the court rejected Lecuyer's assertion that Sunset Trails' section 998 offer was untimely and invalid and ordered her to pay Sunset Trails' costs in the amount of $14,228.48 based on her failure to accept the section 998 offer. Lecuyer's timely appeal from the judgment followed.

DISCUSSION

I. *SUNSET TRAILS' MOTION TO STRIKE EXHIBITS*

As a preliminary matter, we address Sunset Trails' motion to strike exhibit Nos. 9 and 10, which Lecuyer transmitted to and lodged with this court on May 12, 2004, in her two-volume notice of lodgment of exhibits.[6] Exhibit No. 9 is the original transcript of the deposition taken by Sunset Trails of one of Lecuyer's designated experts, architect Grochowiak. Appended to the transcript are copies of numerous other exhibits, including exhibit No. 10, which is a Colorado building division opinion titled *Guardrails Required for Walking Surfaces Adjacent to Window Wells, Retaining Walls, and Parking Areas, Etc.* (the Colorado opinion), acknowledging there was confusion as to whether the UBC required guardrails on constructed walking surfaces detached from or removed from a

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6 By order dated June 23, 2004, this court ordered that Sunset Trails' motion to strike be considered concurrently with Lecuyer's appeal.

building, such as sidewalks and parking areas, and determining that "the intent of the [UBC section 1716] is to require that guardrails be provided along the edges of walking surfaces where there exist more than 30 inches of height difference between the walking surface and the adjoining level or grade."[7]

Sunset Trails contends exhibit Nos. 9 and 10 should be stricken because (1) the Grochowiak deposition and the exhibits attached thereto were not admitted into evidence at trial, and thus are not a part of the record on appeal; (2) the offer of proof that Lecuyer's counsel made at trial using the Grochowiak deposition and the Colorado opinion, was deficient and thus invalid under Evidence Code section 354, subdivision (a); and (3) the lodging of these exhibits after Sunset Trails filed its respondent's brief was prejudicial in that it deprived Sunset Trails of the opportunity to address these materials. We reject these contentions.

As Lecuyer discusses in her opening brief and as the parties acknowledge in their moving and opposition papers, the Grochowiak deposition transcript and the Colorado opinion were part of an offer of proof presented by Lecuyer's counsel during trial. The record shows that in determining whether to allow Lecuyer to present evidence that the lack of a guardrail along the edge of the sidewalk was a violation of UBC section 1716, and thus whether to give a negligence per se jury instruction, the court inquired as to the evidence showing that the drop from the edge of the sidewalk was over 30 inches for

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[7] The lodgment of exhibits also includes eight photographs of the elevated sidewalk and retaining wall area that are the subjects of this appeal. In its motion, Sunset Trails does not seek an order striking these photograph exhibits.

purposes of the guardrail requirement set forth in UBC section 1716. In response, Lecuyer's trial counsel made an offer of proof by stating that Lecuyer's expert, Grochowiak, would testify that the applicable measurement of the drop exceeded 30 inches and thus UBC section 1716 applied and required a guardrail. Counsel specifically offered the transcript of Grochowiak's deposition. Lecuyer's offer of proof also included the Colorado opinion, which counsel stated clarified that the guardrail requirement set forth in the UBC applied to walking surfaces more than 30 inches in height.

Sunset Trails' claim that the Grochowiak deposition and the attached exhibits (including the Colorado opinion) were not admitted into evidence at trial and thus are not a part of the record on appeal, is unavailing. Lecuyer elected under rule 5.1 of the California Rules of Court[8] to proceed in this matter by means of an appellant's appendix in lieu of a clerk's transcript. Rule 5.1(b)(5) states that "[a]ll exhibits admitted in evidence or refused are deemed part of the appendix, whether or not it contains copies of them." Exhibit Nos. 9 and 10 are thus deemed part of Lecuyer's appendix. In her opposition, Lecuyer states that she transmitted those exhibits to this court under rule 18.[9]

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8 All further rule references are to the California Rules of Court.

9 Rule 18(a)(1) provides: "Within 10 days after the last respondent's brief is filed or could be filed under rule 17, a party wanting the reviewing court to consider any original exhibits that were admitted in evidence, refused, or lodged must serve and file a notice in superior court designating such exhibits." Citing this paragraph, one commentator notes that "[t]he transmittal [of exhibits] process normally commences shortly after the *last respondent's brief is filed*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 4:309, p. 4-62 (rev. #1 2003).) Sunset Trails does not assert that Lecuyer failed to comply with the procedures set forth in rule 18.

Sunset Trails' claim that Lecuyer's offer of proof at trial was deficient under Evidence Code section 354, subdivision (a), is also unavailing. The subdivision provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) *The substance, purpose, and relevance of the excluded evidence was made known to the court by* the questions asked, *an offer of proof*, or by any other means." (Italics added.)

Here, the court did not permit Lecuyer's expert witnesses, Bonatus and Grochowiak, to testify about UBC section 1716 as the basis for their opinions. The court refused to give a negligence per se instruction to the jury based on the alleged violation of UBC section 1716. The reporter's transcript of the portion of the proceedings that involved Lecuyer's offer of proof (discussed, *ante*) shows that her counsel adequately presented the "substance, purpose, and relevance" of both Grochowiak's expected testimony and the Colorado opinion within the meaning of Evidence Code section 354, subdivision (a).

Last, Sunset Trails' contention that the lodging of exhibit Nos. 9 and 10 after Sunset Trails filed its respondent's brief was prejudicial in that it deprived Sunset Trails of the opportunity to address these materials is unpersuasive. In her opening brief, Lecuyer's discussion of her offer of proof at trial, and specifically the essence of her counsel's arguments to the court with respect to substance and relevance of Grochowiak's deposition testimony and the Colorado opinion, was accompanied by specific citations to

the reporter's transcript and the Bates Stamp page numbers of relevant portions of exhibit Nos. 9 and 10. Sunset Trails was thus on notice that Lecuyer was relying on these exhibits, yet did not complain about the absence of copies of the exhibits in Lecuyer's appendix until after it filed its respondent's brief. Sunset Trails complains that under rule 5.1(b)(1)(B),[10] Lecuyer was obligated "to include items which she should reasonably assume [Sunset Trails] will rely upon." Indeed, Lecuyer should have included copies of exhibit Nos. 9 and 10 in her appendix. Sunset Trails, however, has failed to demonstrate it was prejudiced by her failure to do so. Sunset Trails does not claim that it did not have a copy of the Grochowiak deposition transcript or the Colorado opinion at the time it prepared its respondent's brief. We note that Sunset Trails, not Lecuyer, took Grochowiak's deposition, and presumably its counsel kept a copy of the deposition transcript and related exhibits, including the Colorado opinion. For all of the foregoing reasons, Sunset Trails' motion to strike exhibit Nos. 9 and 10 is denied.

II. *INSTRUCTIONAL ERROR*

Lecuyer's first three contentions in her opening brief, all of which concern UBC section 1716,[11] challenge the court's decision to not instruct the jury on the negligence

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10 Rule 5.1(b)(1)(B) provides: "(b) Contents of appendix [¶] (1) A joint appendix or an appellant's appendix must contain: [¶] . . . [¶] (B) any item listed in rule 5(b)(3) that is necessary for proper consideration of the issues, including, for an appellant's appendix, any item that the appellant should reasonably assume the respondent will rely on." Rule 5(b)(3) provides: "(b) Contents of transcript [¶] . . . [¶] (3) If designated by any party, the transcript must also contain: [¶] . . . [¶] (B) Any exhibit admitted in evidence, refused, or lodged."

11 See footnote 2, *ante*.

per se theory of liability alleged in Lecuyer's complaint.[12] In her reply brief, Lecuyer asserts that "the bulk of the damage to [her] case occurred during trial, when the [court] ruled that UBC section 1716 did not apply as a matter of law." She complains that "a negligence per se instruction would have changed the entire burden of proof, along with the comparative fault analysis in terms of the degree of culpability of Sunset Trails." We thus begin with a discussion of the standard of review that pertains to a claim of instructional error.

A. *Standard of Review*

A party is entitled upon request to nonargumentative, correct instructions on every theory of the case that is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) *Soule* addressed the standard of appellate review that applies to a claim of instructional error in a civil case and held that "there is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) . . . [¶] Instructional

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12 As previously noted, Lecuyer contends (1) the court erred in finding that UBC section 1716 was inapplicable; (2) the court committed instructional error by not giving a negligence per se jury instruction based on Sunset Trails' failure to install a guardrail as UBC section 1716 allegedly required; and (3) even if UBC section 1716 did not apply directly to the sidewalk condition in question, the court should have allowed her experts to testify concerning UBC section 1716 as a basis for their respective opinions.

error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule*, *supra*, 8 Cal.4th at p. 580, italics added.)

With respect to the factors to be considered in determining whether actual prejudice has resulted from instructional error, the *Soule* court explained that "[a]ctual prejudice must be assessed in the context of the individual trial record. For this purpose, the multifactor test set forth in such cases as *LeMons* [*v. Regents of University of California* (1978) 21 Cal.3d 869] and *Pool* [*v. City of Oakland* (1986) 42 Cal.3d 1051] . . . is as pertinent in cases of instructional omission as in cases where instructions were erroneously given. Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule*, *supra*, 8 Cal.4th at pp. 580-581, italics added, fn. omitted.)

B. *Analysis*

We need not and do not reach the merits of the issue of whether the court erred by ruling that UBC section 1716 was inapplicable, by not permitting Lecuyer's expert witnesses (safety engineer Bonatus and architect Grochowiak) to testify about UBC section 1716 as the basis for their opinions, and by not giving a negligence per se jury instruction. As already discussed, the essence of Lecuyer's assignments of error is that the court improperly prevented the jury from hearing and considering evidence that Sunset Trails' failure to install a guardrail was a violation of UBC section 1716 and erroneously failed to give a negligence per se jury instruction. Even if we were to reach

the merits of Lecuyer's claims of error, reversal would not be required unless she demonstrated the claimed errors were prejudicial. (*Soule*, *supra*, 8 Cal.4th at p. 580.) Accordingly, we assume without deciding that the court erred and proceed to the issue of whether Lecuyer has demonstrated prejudice.

Applying the multifactor test set forth in *Soule*, *supra*, 8 Cal.4th at pages 580-581 (discussed, *ante*), we conclude the assumed error was not prejudicial. With respect to the first factor—the state of the evidence presented at trial—the record shows that although the court did not permit Bonatus to testify about UBC section 1716, it did permit him to state his expert opinion that the lack of a guardrail along the walkway created a dangerous and unsafe condition. Specifically, Bonatus stated that "[m]y first opinion is that when I looked at the site and saw the drop-off from the sidewalk level with the curb there I felt right away it was not a safe condition. There had to be a guardrail there to make it safe for young and old." Lecuyer's counsel later asked Bonatus on direct examination, "But you're saying whether or not there are [building] codes, this . . . is a dangerous condition, correct?" Bonatus replied, "Absolutely." Thus, although the jury did not hear expert opinion testimony that would have supported the negligence per se claim alleged in Lecuyer's complaint, it did hear expert opinion testimony with respect to her common law negligence claim.

With respect to the second factor—the effect of other instructions—although the court did not give an instruction on a negligence per se theory of liability, it did instruct the jury on the common law theory of liability. Specifically, the court instructed the jury on the definition and elements of negligence. The court also told the jury that Lecuyer

was seeking "to recover damages based upon a claim that [Sunset Trails] was the owner[] of certain premises and were negligent in the use, maintenance or management of such premises." The court further instructed the jury that the elements of a claim for negligence against the owners of premises were: "The defendant was the owner of the premises; [¶] [t]he defendant was negligent in the use or maintenance of such premises; [¶] [and] [t]he negligence of the defendant[] was a cause of injury, damage, loss or harm to the plaintiff." In addition, the court instructed that Sunset Trails, as the owner of the premises in question, owed a duty "to exercise ordinary care in the use, maintenance or management of the premises in order to avoid exposing persons to an unreasonable risk of harm," and that the "failure to fulfill this duty is negligence." The effect of the foregoing instructions was to put in the hands of the jurors the decision as to whether Sunset Trails should be held liable for Lecuyer's injuries and resulting damages based on a theory of negligence.

Regarding the third factor—the effect of counsel's arguments—the record shows that during his closing statement, Lecuyer's counsel argued to the jury that the "uncontroverted" testimony of her safety engineer, Bonatus, showed that the unrailed sidewalk was "a dangerous condition that presented a likelihood of injury." Lecuyer's counsel also argued that Sunset Trails "could have put railing" along the top of the retaining wall, and this measure would not have been expensive, "especially in light of the dangerousness of this condition." He further argued that "[g]uard rails are there when a pedestrian is focused on something else," so that "[y]ou don't go over the edge." Although Lecuyer's trial counsel was not permitted to argue to the jury that the lack of a

guardrail was a violation of UBC section 1716, the court did permit him to argue that Sunset Trails was negligent in failing to install a guardrail. Counsel also argued that such negligence was a cause of Lecuyer's injuries.

With respect to the remaining factor, there are no indications in the record that the jury was misled in any manner as a result of the court's failure to give a negligence per se instruction or to allow Lecuyer's experts testify about UBC section 1716. Although Lecuyer's counsel had argued during his opening statement that architect Grochowiak would testify that a railing was required under the UBC, as already noted the court permitted the jury to hear safety engineer Bonatus's expert opinion testimony that the sidewalk was dangerous because it lacked a guardrail.

That the jury credited both Bonatus's expert opinion testimony and the closing arguments made by Lecuyer's attorney is shown by the fact that the jury returned special verdicts finding that Sunset Trails was negligent and that its negligence was a cause of Lecuyer's injuries and damages. The record thus shows that with respect to the issue of liability, the court's failure to give a negligence per se instruction and its decision to not allow Lecuyer's experts to testify about UBC section 1716 had no prejudicial effect on Lecuyer's case.

In her effort to demonstrate prejudice, Lecuyer contends that the giving of a negligence per se instruction supported by evidence in this matter "would have changed the entire burden of proof, along with the comparative fault analysis in terms of the degree of culpability of Sunset Trails." She points out that on the issue of comparative negligence, the jury poll indicated that the jurors found by a vote of nine to three that

Lecuyer was 90 percent at fault, and Sunset Trails was 10 percent at fault. Lecuyer complains that she "was deprived of her right to have the jury instructed as to the law applicable to the theory of her case," and contends "[t]he result would have been much different" had the jury been allowed to learn that Sunset Trails' negligent failure to have a guardrail was "in violation of a clear and tangible provision of law [UBC section 1716]." We reject these contentions.

As already discussed, the court permitted Lecuyer to present expert opinion testimony that the lack of a guardrail was an unsafe condition that was a cause of her injury, and the court properly instructed the jury on the theory of common law negligence of an owner of property. Lecuyer prevailed on that theory of liability. Her assertion that the jury's apportionment of fault would have been more favorable to her had the jury been allowed to hear evidence that the lack of a guardrail was a violation of UBC section 1716 is not supported by the record and is unavailing. The factual determination of whether Sunset Trails breached a duty of care by failing to have a guardrail, and thus whether Sunset Trails should be held liable for Lecuyer's injuries and related damages, is separate from the factual determination of whether and to what extent she was comparatively negligent.

The record shows that ample evidence supported the jury's finding that Lecuyer was 90 percent at fault. On cross-examination, Lecuyer acknowledged that at the time of her fall, she had been going to the Sunset Trails apartment complex three or four times a week after work to visit with her daughter, she had also been going there on weekends if her daughter needed her, and sometimes spent the night there. Lecuyer would park in the

parking lot and walk on the sidewalk that is the subject of this appeal. Lecuyer testified that prior to the incident, she was familiar with that sidewalk, and she had walked on it numerous times in the evening. She also testified that she fell off the sidewalk while wearing a cast as she was stepping backwards, and she was unable to state where along the sidewalk she fell because she was paying to attention to her daughter. She also stated that she never told anyone prior to the incident that she believed the lighting in the parking lot where she fell was inadequate. Lecuyer has failed to meet her burden of showing that it is reasonably probable the jury's determination of Lecuyer share of comparative fault would have been more favorable to her had the court allowed her to present expert witness testimony concerning UBC section 1716 and given a negligence per se instruction.

III. *AWARD OF COSTS UNDER SECTION 998*

Lecuyer also argues the court erred in ordering her to pay Sunset Trails' costs under section 998 because (Lecuyer asserts) Sunset Trails' section 998 offer was not valid as it was not served by mail at least 15 days prior to trial. We conclude Sunset Trails' section 998 offer was not timely, and thus the portion of the judgment imposing Sunset Trails' costs on Lecuyer must be reversed.

Section 998, subdivision (c)(1) (hereafter § 998(c)(1)) provides that "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff . . . shall pay the defendant's costs from the time of the offer." Subdivision (b) of that section (hereafter § 998(b)) governs the service of a

section 998 offer and provides that such an offer may be made any time up to 10 days before the commencement of trial:

> "*Not less than 10 days prior to commencement of trial . . . any party may serve an offer* in writing upon any other party to the action to allow judgment to be taken . . . in accordance with the terms and conditions stated at that time." (Italics added.)

Subdivision (b)(2) of section 998 provides in part that "[i]f the offer is not accepted prior to trial[,] within 30 days after it is made, *whichever occurs first*, it shall be deemed withdrawn." (Italics added.) Thus, a section 998 offer is deemed withdrawn upon commencement of trial even if the 30-day period has not yet expired. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 12:623, p. 12(II)-24 (rev. #1 2004).) For purposes of section 998(b), a trial is deemed to commence at the beginning of the opening statement of the plaintiff or plaintiff's counsel, or, if there is no such opening statement, when the first witness is sworn or "any evidence" is introduced. (§ 998(b)(3).)

Here, Sunset Trails served Lecuyer *by mail* with a section 998 offer in which it offered to settle the action by allowing judgment to be taken against it and in favor of Lecuyer in the amount of $150,001, with each party bearing its own costs. Lecuyer did not accept the offer and failed to obtain a more favorable judgment within the meaning of the cost-shifting provision set forth in section 998(c)(1) (discussed, *ante*).[13]

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13 Based on the jury's findings that Lecuyer suffered damages in the total amount of $357,945.52, but that she was 90 percent at fault, the record shows the jury awarded her damages in the amount of $35,794.55, excluding costs. In posttrial proceedings, the court rejected Lecuyer's assertion that Sunset Trails' section 998 offer was invalid because it

Lecuyer argues that the service by mail of Sunset Trails' section 998 offer on February 19 was not timely, and thus the offer was not valid, because Sunset Trails was required under section 1013, subdivision (a) (hereafter § 1013(a)) to give an additional five days' notice of the offer, and thus it was required to mail the offer no later than February 17, 15 days prior to commencement of trial.

The question we must decide is whether the provisions of section 1013(a) apply to the 10-day notice requirement set forth in section 998(b), which requires that a section 998 offer be served "[n]ot less than 10 days prior to commencement of trial." We hold that it does.

Section 1013(a) provides in part:

> "*In case of service by mail*, . . . [t]he service is complete at the time of the deposit, but *any period of notice* and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, *shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California*." (Italics added.)

In *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 273 (*Poster*), the California Supreme Court explained that "[s]ection 1013[(a)] has been described as 'a procedural statute of general application' [citation] and has been construed broadly to include within its ambit not only notices of motions, but numerous other types of notices

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was not served in a timely manner and ordered Lecuyer to pay Sunset Trails' costs in the amount of $14,228.48 based on her rejection of the section 998 offer. The court entered judgment in favor of Lecuyer, awarding her damages in the net amount of $32,604.68 plus interest.

and responses thereto." Noting that "[b]y its terms, section 1013 appears clearly to apply to the time period prescribed by section 998 for accepting statutory offers of compromise," the *Poster* court held that "*when a statutory settlement offer pursuant to section 998 is served by mail, the provisions of section 1013 apply* and extend the 30-day period for acceptance of the offer by 5 days." (*Poster, supra,* at pp. 274, 275, italics added.)[14]

By its terms, section 1013(a) extends "any period of notice" where the paper in question is served by mail. We construe the 10-day notice requirement set forth in section 998(b) to be a "period of notice" within the meaning of section 1013(a) and hold that because the provisions of section 1013(a) apply when a statutory settlement offer under section 998 is served by mail (*Poster, supra,* 52 Cal.3d at p. 275), the provisions of section 1013(a) extend that 10-day notice requirement when the section 998 offer is served by mail. Thus, when (as here) a section 998 offer is mailed from an address in California to an address in California in an action set for trial, the section 998(b) 10-day notice period is extended by five days under section 1013(a), and the offeror is required to mail the offer not less than 15 days prior to commencement of trial. (§§ 998(b), 1013(a).)

Here, the trial commenced on March 4 when Lecuyer's counsel made his opening statement. (See § 998, subd. (b)(3), discussed, *ante*.) Thus, to serve its section 998 offer

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14 We note that *Poster, supra,* 52 Cal.3d 266, does not answer the question presented here because it involved the issue of whether the provisions of section 1013(a) extended the period for *acceptance* of a section 998 offer served by mail.

by mail in a timely manner, Sunset Trails was required to mail the offer no later than February 17.[15] Because Sunset Trails mailed the offer on February 19, two days late, we conclude it was not served in a timely manner, and therefore it was invalid and the cost-shifting provision of section 998(c)(1) did not apply. Accordingly, the portion of the judgment imposing Sunset Trails' costs on Lecuyer under section 998 must be reversed.

DISPOSITION

The portion of the judgment requiring Lecuyer to pay Sunset Trails' costs based on her failure to accept Sunset Trails' untimely and invalid section 998 offer is reversed. The portion of the judgment awarding her damages in the net amount of $32,604.68 is thus also reversed to the extent the court reduced the award of damages by the amount of defense costs it ordered Lecuyer to pay under section 998. The remaining portions of the judgment are affirmed. The matter is remanded with directions to amend the judgment in a manner consistent with this opinion. The parties shall bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.

15 Section 12 provides that "[t]he time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." Applying section 12 so as to exclude February 17, the fifteenth day after that date was March 4, the day the trial commenced in this matter.